SC 95067

IN THE MISSOURI SUPREME COURT

VIRGINIA PAYNE,
Plaintiff/Respondent,

vs.

ASHLEY MARKESON
Defendant/Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Jack Grate

RESPONDENT VIRGINIA PAYNE'S SUBSTITUTE BRIEF

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The Trial Court did not err in denying Defendant Markeson's motion to reduce the jury's verdict under §537.060 because it is the public policy of this state, as expressed by the adoption of §537.053, to place the responsibility for an injured party's damages on the drunk driver who caused them, and allowing Defendant Markeson a reduction for the

amount paid by the settling dram shop would violate this policy in that she would escape the very responsibility the legislature intended to place on her.

Jodelis v. Harris, 517 N.E.2d 1055 (Ill. 1987)

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ARGUMENT

I. - Responding To the First Part of Appellant's Point I

The Court did not err in denying Defendant Markeson's Motion to Reduce the Jury's Verdict Pursuant to §537.060 because the statute upon which Defendant relies only applies to joint tortfeasors whose conduct caused the same injury. Here, Defendant Markeson and the settling dram shop were not joint tortfeasors who caused the same injury in that the dram shop's liability did not arise in tort but under §537.053 which provides the exclusive remedy against dram shops, and, unlike tort actions, does not require a showing that the dram shop's conduct proximately caused plaintiff's injuries.

A. Introduction

Defendant Markeson was driving drunk when she crossed the center line of the road and collided with Plaintiff Payne. Plaintiff sued both Defendant Markeson and MM Investments, the dram shop that served alcohol to Defendant Markeson. Plaintiff settled her §537.053 RSMo claim against the dram shop and obtained a judgment against Defendant Markeson. Defendant Markeson claims that under §537.060 RSMo she is entitled to have the judgment against her reduced by the amount Plaintiff received from the dram shop.

By its plain language, §537.060 only applies if the co-defendants are "liable in tort for the same injury." Here, the settling dram shop defendant was not liable in tort, and therefore, the Trial Court properly denied Defendant Markeson's motion to reduce the verdict.

B. MM Investments Was Not "Liable In Tort", And Therefore, The Trial Court Correctly Found That §537.060 RSMo. Did Not Apply.

Missouri courts have consistently held that §537.060 RSMo only applies between joint tortfeasors. See, e.g., *Carter v. St. John's Regional Medical Center, 88 S.W. 3d 1, 23 (Mo.App 2002)*. In support of this conclusion, the Courts note that the statute provides in part, "when an agreement by release…is given in good faith to one or more persons *liable in tort* for the same injury… ." *Id*. and §537.060 RSMo (emphasis added). Here, the settling dram shop defendant, MM Investments, Inc., was not "liable in tort" for the same injury as Defendant Markeson, and therefore, §537.060 does not apply. See *Hopkins v. Powers, 497 N.E.2d 757 (Ill. 1986)*.

In *Hopkins*, the Illinois Supreme Court held that a tavern sued under the state's dram shop act is not "liable in tort". *Id*. at 759. The Court noted that while the serving of intoxicating beverages may impose liability on dram shops, that liability is not grounded in tort, but arises purely from the Act. The Court concluded that because the liability of dram shops under the Act "is exclusive *sui generis* non-tort liability", the defendant bar was not "liable in tort." *Id*.

Likewise, here, the settling bar's liability arose only out of our Dram Shop Act, §537.053 RSMo. Liability under the Act "is exclusive *sui generis* non-tort liability." *Id*. Thus, §537.060 RSMo. does not apply because the settling defendant was not "liable in tort." *Id*. and *State v. Therrien, 830 A.2d 28, 36 (Vt. 2003)* where the Vermont Supreme Court noted, "courts have frequently found that failures to comply with statutory obligations, without more, are not torts for purposes of rules pertaining to contribution

among joint tortfeasors." (citations omitted). See also, *Feuerherm v. Ertelt, 286 N.W.2d 509, 511 (N.D. 1979)* where the North Dakota Supreme Court concluded that liability under its dram shop act was *sui generis* non-tort liability. Finally, see *Wendelin v. Russell, 147 N.W.2d 188, 193 (Iowa 1966)* where the Iowa Supreme Court stated, "the liability of the supplier [of intoxicating liquor] is statutory ***not standing in tort…***" (emphasis added).

1. A Defendant Is Liable In Tort Only If Its Conduct Proximately Caused Plaintiff's Injury.

Markeson rhetorically asks on page 20 of her Brief "**What is a tort**?" Professors Prosser and Keeton, in the beginning of their hornbook, The Law of Torts, state, "[A] really satisfactory definition of a tort has yet to be found." In their continuing discussion in the initial chapter, Prosser and Keeton state, "Abandoning the attempt to find a definition, which, 'strictly speaking, is nothing but an abbreviation in which the user of the term defined may please himself,' some writers have attempted to discover certain characteristics common to all torts which may throw some light on their nature." See pages 1 and 4 of The Law of Torts, Prosser and Keeton (5th Ed. 1984).

Markeson as a user of the term "tort" picks bits and pieces from cases in order to advance a definition which would, in Prosser's words, "please herself" because it advances her argument here for the application of a credit. Payne recognizes that Markeson may say the same about her if she points to certain definitions of a tort. Thus, the focus turns to what Missouri courts have found are the necessary elements to find that a defendant is "liable in tort."

In *Rigby Corp., v. Boatmen's Bank and Trust Co., 713 S.W.2d 517, 542-543 (Mo.App. 1986)* the Court relied in part upon Prosser and Keeton's Law of Torts and Missouri precedent in concluding that a plaintiff, to prove a cause of action in tort, must prove that the defendant's conduct was the legal cause of the result. *Id*. at 542. It is not enough that damage follows the misconduct. *Id*. As discussed below, the legislature has stated in §537.053 that a dram shop's conduct of serving alcohol is not the legal cause of the damage inflicted by an intoxicated person. Thus, it would be contrary to Missouri law to conclude that liability under §537.053, which attaches without any showing that the defendant's conduct was the legal cause of plaintiff's injuries, is liability in tort.

The *Rigby* Court is not alone in finding that to be liable in tort a defendant's conduct must be shown to be the proximate cause of plaintiff's injury. See also *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P., 75 S.W.3d 247, 257, (Mo. banc 2002)*(explaining that the basic elements of a tort include duty, breach and damages, and therefore, a plaintiff must show that defendant's conduct "proximately caused injury to the plaintiff"); *Elam v. Alcolac, Inc., 765 S.W.2d 42, 174 (Mo.App. 1988)*("our law requires proof of cause to recover in tort"); and *Collins-Camden P'ship, L.P. v. County of Jefferson, 425 S.W.3d 210, 214 (Mo.App. 2014)* (elements of a tort include: duty, breach, causation, damages).

More specifically, Missouri Courts have found that to held liable as a joint tortfeasor, the defendant's conduct must have proximately caused plaintiff's injuries. In *Van Vacter v. Hierholzer, 865 S.W.2d 355, 358 (Mo.App. 1993)* the Court of Appeals explained that a finding of proximate cause between a defendant's conduct and plaintiff's

injury is "a prerequisite to labeling [the defendant] a joint tortfeasor…." Likewise, the Court in *Gibson v. City of St. Louis, 349 S.W.3d 460, 465 (Mo.App. 2011)* concluded that "joint tortfeasor" includes a single indivisible harm *caused* by the wrongful acts of two or more persons. As discussed below, §537.053 specifically states that the dram shop's conduct is not the cause of the injuries inflicted by an intoxicated person, and therefore, the settling dram shop and Defendant Markeson are not joint tortfeasors.

While Defendant Markeson asks "what is a tort" she seems to concede that to be liable in tort, a defendant's conduct must be a proximate cause of plaintiff's injury because she insists that proximate cause is a required element of a plaintiff's cause of action against a dram shop. As discussed below, plaintiff's exclusive remedy against a dram shop is under §537.053, and that statute does not require proof of proximate cause.

2. Section 537.053 Provided The Exclusive Remedy Against The Settling Defendant, MM Investments.

The Dram Shop Act provides the exclusive, limited, remedy against a dram shop. See, *Auto Owners Ins. Co. v. Sugar Creek Memorial Post No. 3976, 123 S.W.3d 183, 191 (Mo.App 2003)*. In *Auto Owners*, the Court of Appeals stated that the Dram Shop Act is a "legislative prohibition against dram shop liability coupled with the creation of a limited cause of action." *Id*. The court went on to state, "It is a well-established principal that when a statute creates a new right…that did not exist at common law…, and also provides a specific remedy for the enforcement thereof, *the statutory remedy is exclusive."* *Id*.(emphasis added)(citation omitted). Likewise, in *Von Ruecker v. Holiday Inns, Inc., 775 S.W.2d 295, 299 (Mo.App. 1989)*, the Court of Appeals held that the Act

"created a limited cause of action where none previously existed" and was the plaintiff's exclusive remedy. Consequently, the Court affirmed the dismissal of plaintiff's negligence, intentional tort, strict products liability, negligent products liability and breach of contract claims.

Pursuant to the cases discussed above, the settling defendant's liability arose only under the Dram Shop Act. As discussed above and below, liability under the Act "is exclusive *sui generis* non-tort liability", and therefore, §537.060 RSMo does not apply.

3. A Dram Shop Is Liable Under §537.053 Even Though Its Conduct Did Not Proximately Cause Plaintiff's Injury, And Therefore, A Dram Shop Is Not Liable In Tort.

In the very first paragraph of §537.053, the legislature makes it clear that the "furnishing of alcohol is not the proximate cause of injuries inflicted by intoxicated persons." [1] The Act specifically states:

> Since the repeal of the Missouri Dram Shop Act in 1934… it has been and continues to be the policy of this state … to prohibit dram shop liability and *to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons*.

[1] The Act is consistent with the case law which has found that under the common law, it is the consumption of alcohol by a defendant that is the proximate cause of plaintiff's injury, not the furnishing of the alcoholic beverage. See, *Auto Owners Ins. Co., 123 at 191* and *Gabelsberger v. J.H., 133 S.W.3d 181, 185-186 (Mo.App. 2004).*

§537.053.1(emphasis added). Not only does the legislature plainly state that the furnishing of alcohol is not the proximate cause of plaintiff's injuries, in a 2002 amendment to the Act, the legislature actually eliminated the requirement that a plaintiff prove proximate cause in order to succeed under the Act.[2] In other words, a dram shop is liable under the Act notwithstanding the fact that its conduct was not the legal cause of plaintiff's injuries. Consequently, a dram shop's liability under the Act does arise in tort; rather, it is "exclusive *sui generis* non-tort liability." *Hopkins*, 497 N.E.2d at 759 and *Feuerhurm*, 286 N.W.2d at 511, and see generally *L.A.C., 75 S.W.3d at 257)*; *Elam, 765 S.W.2d at 174* ("our law requires proof of cause to recover in tort"); and *Van Vacter, 865 S.W.2d at 358* (a finding of proximate cause between a defendant's conduct and plaintiff's injury is "a prerequisite to labeling [the defendant] a joint tortfeasor….").

Defendant Payne asserted an affirmative defense claiming that she was entitled to a reduction of damages under §537.060. That statute only applies among joint tortfeasors. See, *Carter, 88 S.W.3d at 23*. A prerequisite to finding that a defendant is a joint tortfeasor is finding that the defendant's conduct proximately caused the plaintiff's injuries. *Van Vacter, 865 S.W.2d at 358*. Here, the settling defendant was liable only under §537.053 which explicitly states that the defendant's conduct was not the proximate cause of a plaintiff's injuries. Thus, MM Investments was not a joint torfeasor with Defendant Markeson, and the Trial Court properly concluded that §537.060 does not

[2] A copy of the current version of the Act, and the previous version of the Act are attached in the appendix for the Court's comparison.

provide Defendant Markeson with a right of reduction. Plaintiff Payne respectfully requests that this Court deny Defendant's Point I and affirm the Trial Court's judgment.

4. Defendant's Interpretation Of The Dram Shop Act Is Contrary To The Plain Language Of The Act, And Rules Of Statutory Construction.

The only mention of "proximate cause" in the Act occurs in the first paragraph where the legislature unequivocally states that the furnishing of alcohol is not the "proximate cause of injuries inflicted by intoxicated persons." Nonetheless, Defendant insists that proximate cause is a required element to find liability under the Act. (Appellant's Brief at 26). Defendant reads into the statute words that do not appear there and, in fact, contradict what the legislature has plainly said. If the legislature intended proximate cause to be an element of a claim under the Act, it could have plainly said so as it did in the previous version of the Act. But, it didn't.

This Court has consistently held that courts may not engraft upon a statute provisions which do not appear in the explicit words or by implication from other words in the statute. See, *Metro Auto Auction v. Director of Revenue*, *707 S.W.2d 397, 402 (Mo. banc 1986)*. Rather, the Court must be guided by what the legislature said, not by what the Court thinks it meant to say. *Id*. at 401. Even if the legislature inadvertently, or through lack of foresight, omitted language from the Act, the Court is not entitled to supply the omitted provision or language. See *State ex rel. Mercantile National Bank v. Rooney*, *402 S.W.2d 354, 362 (Mo. 1966)*.

Furthermore, courts cannot transcend the limits of their constitutional powers and engage in judicial legislation by supplying omissions or remedying alleged defects in

matters delegated to the legislature. *Board of Ed. of City of St. Louis v. State, 47 S.W.3d 366, 371 (Mo. banc 2001)*. Even if the Court prefers a policy different from that enunciated by the legislature, it is not for the Court to question the wisdom, social desirability or economic policy underlying the statute; these are matters for the legislature. See *Greenlee v. Duke's Plastering Service, 75 S.W.3d 273, 277-78 (Mo. banc 2002)* and *American Standard Ins. v. Hargrave, 34 S.W.3d 88, 90 (Mo. banc 2000)*.

Defendant's claim, that the Act requires a plaintiff to prove that the dram shop's furnishing of alcohol was the proximate cause of plaintiff's injuries, reads into the Act language which is not there. Language which, as discussed below, was in fact deleted from the Act. For support of her argument, Defendant cites *Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)* and *Auto Owners Ins. Co. v. Sugar Creek Mem'l Post No. 3976, 123 S.W.3d 183 (Mo.App. 2003)*, but both of those cases involved the prior version of the statute which did in fact require the injured party to prove that the dram shop's conduct proximately caused her injury. *17 S.W.3d at 550 and 123 S.W.3d at 191*.

While Defendant Markeson may believe that the Act, without a proximate cause requirement, is absurd, the legislature obviously did not. And it is not for the Court to question the wisdom or social desirability of the Act as written as these are matters for the legislature's determination. See *Greenlee, 75 S.W.3d at 277-78* and *American Standard Ins., 34 S.W.3d at 90*. What's more, other jurisdictions have found it socially desirable to pass legislation that, like our Dram Shop Act, holds those who furnish alcoholic beverages liable in the absence of proximate cause. See section 6 below. Finally, as the United States Supreme Court has found, the Twenty-First Amendment to

the Constitution gives broad police power to the states to regulate the sale of intoxicating liquor. See, *City of Newport v. Iacobucci, 479 U.S. 92, 96, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986).*

5. Defendant's Interpretation Of The Act Ignores The Legislature's 2002 Amendment To The Act Which Deleted The Proximate Cause Requirement From The Act.

Prior to the 2002 amendment, §537.053 stated in part:

> Notwithstanding subsections 1 and 2 of the section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink…***if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person***.

(emphasis added). Thus, prior to the 2002 amendment, the Act required the plaintiff, in a dram shop action, to prove that the dram shop's sale of intoxicating liquor was the proximate cause of plaintiff's injuries. The legislature's 2002 amendment deleted this requirement. Defendant fails to even mention the amendment, much less explain why the legislature's action of deleting the proximate cause element was meaningless - so meaningless that this Court should read the words right back into the statute. Defendant's argument is contrary to the mandate that meaning must be given to a legislative amendment. See, *State v. Sweeney, 701 S.W.2d 420, 423 (Mo. banc 1985)* and *State ex rel. Director of Revenue v. Gaertner, 32 S.W.3d 564, 566 -567 (Mo. banc 2000).*

In *Gaertner*, this Court stated, "When the legislature has altered an existing statute such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act." (citations omitted). The Court of Appeals has likewise stated, "When the General Assembly alters a statute, [Courts] are ***obligated*** to deem the alteration as having an effect. [Courts] are not to conclude that the legislature's deleting significant terms from its statutes is meaningless." *State v. Bouse, 150 S.W.3d 326, 334 (Mo.App. 2004)* (emphasis added) citing *Sweeney, 701 S.W.2d at 423*. This is true even if the amendment results in consequences the legislature may not have intended. See, *Pettis v. Missouri Department of Corrections, 275 S.W.3d 313, 319 (Mo.App. 2008)*, where the Court concluded that it could not read into the statute language that had been removed even though the legislature may not have anticipated what would result from its amendment.

Here, Defendant's interpretation of §537.053 fails to give any effect to the legislature's 2002 amendment which deleted the requirement that the plaintiff, in a dram shop action, prove that the dram shop's sale of intoxicating liquor was the proximate cause of plaintiff's injuries. In fact, Defendant reads back into the statute the very words the legislature deleted.

Despite the plain language of the Act, and the fact that the legislature actually deleted the proximate cause requirement from the Act, Defendant claims that the second paragraph of the Act reinstates the proximate cause requirement. The Act states in paragraph 1 that "furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated person." Paragraph 2 of the Act begins, "Notwithstanding

subsection 1 of this section, a cause of action may be brought…." Replacing the phrase "subsection 1" with the proximate cause language from subsection 1, the second paragraph would read: "Notwithstanding [that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons] a cause of action may be brought…." In other words, even though the "furnishing of alcoholic beverages is not the proximate cause of injuries inflicted by an intoxicated person", the legislature is going to allow a cause of action against dram shops if the elements of paragraph 2 are proven. Proximate cause is not one of those elements. To suggest otherwise renders the legislature's 2002 amendment meaningless.

6. The Lack Of A Proximate Cause Requirement Is Not Unique To Missouri's Dram Shop Act

Missouri's dram shop act, which imposes liability upon a dram shop without a showing of proximate cause, is not unique. Interpreting its dram shop act, the Iowa Supreme Court stated, "We do not even reach the proximate cause issue because the legislature made the policy decision to impose liability on the one who furnished the intoxicating beverage to the one who inflicted the injury. Proximate cause is therefore not an issue." *Berte v. Bode, 692 N.W.2d 368, 373 (Iowa 2005)*. Likewise, here, the legislature made the policy decision to impose liability on a dram shop without the showing that the dram shop's conduct proximately caused plaintiff's injury.

See also *London & Lancashire Indem. Co. of Am. v. Duryea, 119 A.2d 325, 327 (Conn. 1955)*, where the Connecticut Supreme Court found that its dram shop act, after being amended by the legislature, no longer required a showing that the dram shop's

conduct proximately caused plaintiff's injury. The Court explained, "Whether the legislature intended so drastic a change is not for the court to speculate. The language of [the Act] is plain and it cannot be construed to embrace something which obviously it does not." Likewise, here, after the legislature's 2002 amendment to §537.053, the statute no longer requires a showing that Plaintiff's injuries were proximately caused by the dram shop's conduct. As with the Connecticut dram shop act, Missouri's Act "cannot be construed to embrace something which obviously it does not."

C. Conclusion

Defendant Markeson claimed as an affirmative defense that the judgment against her should be reduced pursuant to §537.060. The Trial Court properly found that no such reduction was appropriate. Section 537.060 only applies between joint tortfeasors. A prerequisite to finding that a defendant is a joint tortfeasor is a finding that the defendant's conduct proximately caused the plaintiff's injuries. Because our legislature has explicitly stated that the furnishing of alcohol is not the proximate cause of a plaintiff's injuries, and eliminated the element of proximate cause from a dram shop action, the settling dram shop in this case was not a joint torfeasor with Defendant Markeson. Thus, §537.060 does not provide Defendant Markeson with a right of reduction. Plaintiff Payne respectfully requests that this Court deny Defendant's Point I and affirm the Trial Court's judgment.

II. - Responding to Second Part of Appellant's Point I.

The Trial Court did not err in denying Defendant Markeson's motion to reduce the jury's verdict under §537.060 because it is the public policy of this state, as expressed by the adoption of §537.053, to place the responsibility for an injured party's damages on the drunk driver who caused them, and allowing Defendant Markeson a reduction for the amount paid by the settling dram shop would violate this policy in that she would escape the very responsibility the legislature intended to place on her.

A. Allowing Defendant Markeson A Reduction Would Violate The Public Policy Of Placing The Responsibility For A Plaintiff's Damages On The Drunk Driver Who Caused Them.

Paragraph 4 of §537.053 provides:

> Nothing in this section shall be interpreted to provide a right of recovery to a person who suffers injury or death proximately caused by the person's voluntary intoxication unless the person is under the age of twenty-one years. No person over the age of twenty-one years or their dependents, personal representatives, and heirs may assert a claim for damages for personal injury or death against a seller of intoxicating liquor by the drink for consumption on the premises arising out of the person's voluntary intoxication.

Here, Markeson seeks an offset by reason of monies paid by the tavern in an action arising out of Markeson's voluntary intoxication. If the reduction is allowed, Markeson would be the beneficiary of monies paid by the bar for injuries caused by Markeson's

voluntary intoxication. The Act does not allow for such a result. See *Jodelis v. Harris*, *517 N.E.2d 1055 (Ill. 1987).*

In *Jodelis*, the Illinois Supreme Court noted, "Neither the Dram Shop Act nor the common law exposes a dram shop to liability when intoxicated patrons suffer injuries as a result of their own intoxication. A dram shop, thus, is not subject to liability to such persons within the meaning of the Contribution Act." *Id*. at 1058. If Payne's settlement with the tavern is used to reduce her verdict against Markeson, then Markeson has received contribution from the bar for injuries her voluntary intoxication caused. This contribution is contrary to the public policy enunciated by the statute's prohibition against a voluntarily intoxicated person's claim against a dram shop. Thus, the Trial Court properly found that Defendant Markeson should not receive an offset.

In *Von Ruecker v. Holiday Inns, Inc., 775 S.W.2d 295, 298 (Mo.App. 1989)* the Court explained that the legislature's "prohibition of dram shop liability coupled with the creation of a new, limited cause of action" under §537.053 was "justified in that the legislature made a policy decision to place responsibility on the drunk driver." Allowing Markeson to escape paying for Plaintiff Payne's injuries because the dram shop paid to settle the case against it would defeat this legislative purpose. Such a reduction would also violate the express prohibition against an intoxicated driver having any right of recovery for injuries caused by her voluntary intoxication. Thus, Plaintiff Payne respectfully requests that this Court deny Defendant's Point I.

Defendant urges this Court to reject the holding in *Jodelis* because "Missouri public policy protecting dram shop owners from liability is very different from the public

policy of Illinois." (App. Brief at 31). In support of this argument, Defendant cites *Dunaway by Dunaway v. Fellous, 842 S.W.2d 166 (Mo.App. 1992)*. The difference in the States' public policies, as articulated in *Dunaway*, further supports a finding that allowing Defendant Markeson a reduction would violate Missouri public policy.

As explained in *Dunaway*, the policy in Missouri "is to make the consumption rather than the furnishing of alcoholic beverages the proximate cause of injuries inflicted by intoxicated persons." *Id*. at 168. And further, "to place responsibility for these accidents on the drunk driver." *Id*. at 169. Allowing Defendant Markeson a reduction under §537.060 would defeat this public policy. She, the drunk driver, will have no responsibility to pay for the damages she, not the bar, caused. Allowing the drunk driver in this case to escape all responsibility for the damages she caused is directly contrary to the public policy of this State as articulated by the *Dunaway* Court.

The Illinois dram shop act is different than the Missouri Act as Defendant argues. Illinois treats the furnishing of alcohol as a proximate cause of a plaintiff's injuries, Missouri doesn't. This difference does not diminish the applicability of the holding in *Jodelis*. Even though the furnishing of alcoholic beverages is considered a proximate cause of a plaintiff's injuries in Illinois, the Illinois Supreme Court still found that an intoxicated driver is not entitled to contribution from a dram shop. *Jodelis, 517 N.E.2d at 1058*. There is even less reason in Missouri to allow the drunk driver to reduce her responsibility for the damages she caused by the amount paid by a bar whose conduct was not the proximate cause of Plaintiff's damages.

B. Refusing To Allow A Drunk Driver A Reduction Under §537.060 For Monies Paid By A Dram Shop Does Not Impair The Policy Behind §537.060

Throughout her brief, Defendant emphasizes that a public policy behind §537.060 is to encourage settlements. Plaintiff does not disagree. But, this policy is not at all impaired by refusing to reduce the amount she must pay for the damages she caused by the amount paid by a dram shop whose conduct did not cause Plaintiff's injuries.

As the Court of Appeals explained, the intent of §537.060 is "to encourage settlements between tort-feasors and injured claimants—with the incentive being a settling tort-feasor can put the incident to rest and will not be subject to a later action for contribution." *State ex rel. Curators of University of Missouri v. Moorhouse, 181 S.W.3d 621, 624 (Mo.App. 2006)*(citation omitted). First, as discussed above, the settling dram shop is not a tort-feasor. But even if it was, it is able to "put the incident to rest" by settling with the Plaintiff without later being subjected to a claim for contribution by the drunk driver. See §537.053.4 which precludes a drunk driver from bringing an action against the dram shop. Thus, precluding a drunk driver from reducing a judgment entered against her by the amount of the settlement paid by a dram shop will not discourage dram shops from settling cases.

Allowing a drunk driver to reduce her liability for the damages she caused, however, will actually discourage drunk drivers from settling cases against them. Allowing a reduction incentivizes drunk drivers to wait and see if the dram shop settles so that the drunk drivers can then reduce their responsibility for the damages they caused.

Thus, the public policy of encouraging settlements will be defeated by allowing a reduction.

C. The Defendant's Double Recovery Argument Does Not Apply.

Defendant also argues that precluding her reduction would result in a "double recovery" to Plaintiff, and that such is to be avoided. Our Courts have found that where §537.060 does not apply, as between an injured party and a tortfeasor, any alleged windfall should go to the injured party. See, e.g., *Douthet v. State Farm Mut. Auto. Ins. Co., 546 S.W.2d 156, 159 -160 (Mo. banc 1977)* where the Supreme Court stated:

> In this case, the defendant did not create or pay for and was not the source of the workmen's compensation payments received by plaintiff. If defendant company is allowed credit therefor, it receives a windfall in that its coverage is reduced in spite of the public policy of Missouri expressed in § 379.203. In such a situation, if there is to be a windfall, it should go to the injured person rather than to insurer.

Likewise, here, Defendant did not create or pay for and was not the source of the payment Plaintiff received from the settling dram shop. And if Defendant is allowed a credit for that settlement, she receives a windfall in that she is not obligated to pay for the damages her conduct proximately caused. Thus, if there is to be a windfall, it should go to the Plaintiff. *Id*. See also, *Jim Toyne, Inc. v. Adams, 916 S.W.2d 381, 383(Mo.App. 1996)* where this Court of Appeals stated, "Moreover, if anyone should benefit from a 'windfall' in cases such as this, it should be the party wronged—not the tortfeasor."

In *Lockwood v. Schreimann, 933 S.W.2d 856, 861 (Mo.App. 1996)* the Court of Appeals refused to allow a reduction under §537.060 for a workers compensation

settlement the plaintiff had received noting that the statute applies only between joint tortfeasors. In response to defendant's "double recovery" argument, the Court cited *Douthet*, *supra*, and stated, "in the absence of express statutory authority; however, we believe [the] rationale [in *Douthet*] would apply in this case…." *Id*. at 861, n.7. Finally, in *Elfrink v. Burlington Northern R. Co.*, *845 S.W.2d 607, 615 (Mo.App. 1992)*, the Court of Appeals refused a reduction under §537.060 for payment received from an uninsured motorist carrier because "the right of the injured party to recover from an uninsured motorist carrier arises from the insurance contract, rather than in tort."

Here, the only ground for reduction cited by Defendant Markeson was §537.060. Because the settling dram shop was not liable in tort, the statute does not apply, and there is no statutory authority for reducing Plaintiff's judgment against Defendant Markeson. Under these circumstances, as between a drunk driver and the person injured by the drunk driver, the injured party should receive any alleged windfall.

Finally, the amount paid by the settling dram shop was payment of a penalty for failing to follow the law; rather than compensatory damages. In *Mayes v. Byers*, *7 N.W.2d 403, 407 (Minn. 1943)*, the Supreme Court of Minnesota found that recovery under its Dram Shop Act was not allowed "on the basis of a wrong done to plaintiff." Rather, the Court held that it was "a punishment to defendant for having violated the law." And the plaintiff was the beneficiary of recovering the penalty. *Id*. The Court noted that although the penalty is measured by the amount of plaintiff's damages, the plaintiff is allowed to recover such a penalty "to secure the more effective observance of the statute by giving incentive to someone to enforce the penalty." *Id*. Finally, the Court

found that allowing a party to recover such a penalty "is not an uncommon provision." *Id*. (citations omitted).

The Connecticut Supreme Court reached a similar conclusion in *Pierce v. Albanese, 129 A.2d 606 (Conn. 1957)*. In that case, the Court stated that the "obvious purpose" of its dram shop act is to aid the enforcement of [liquor laws] by imposing a penalty, in the form of a civil liability…to protect the public." *Id*. at 612.

D. Conclusion

Defendant Markeson is not entitled to a reduction in the amount of damages her voluntary intoxication caused. First, as discussed in point one, she and the dram shop are not joint tortfeasors. Second, the public policy of this state precludes such a reduction. Our Courts have consistently held that the public policy of this state, as expressed by the adoption of §537.053, is to place the responsibility for an injured party's damages on the drunk driver who caused them. If Defendant Markeson is allowed a reduction of the judgment against her by the amount paid by the settling dram shop, then she will escape the very responsibility the legislature intended to place upon her. Such a result would defeat the public policy of our State. Thus, Plaintiff respectfully requests that this Court affirm the judgment of the Trial Court.

III. - Responding to Appellant's Point II

The Trial Court did not commit reversible error in finding that even if the actual damage award was reduced to zero, Defendant Markeson would still owe the punitive damage award entered against her because under Missouri law an actual damage award, even if reduced to zero by the payment of a settling defendant, is sufficient to support a punitive damage award, and here, it is undisputed that the jury returned an actual damage award in favor of Plaintiff Payne.

A. The Trial Court's Ruling As To Punitive Damages Was Not Premature

In the words of the Court of Appeals, "[W]e fail to see how a matter first raised by Markeson in response to the initial judgment, raised again with this Court in the first appeal, and raised yet again in her suggestions on remand, was somehow 'premature' for the trial court's determination. To the contrary, the issue was plainly presented to the trial court for determination."

Defendant cites *Robinson v. State Highway & Transp. Comm'n, 24 S.W.3d 67, 82 (Mo.App. 2000)* in support of her prematurity argument. In *Robinson*, the trial court granted defendants' motion for summary judgment finding that they were not liable to plaintiff. When the trial court found that the defendants were not liable, the issue of punitive damages became moot. *Id. at 81-82*. Nonetheless, the trial court further ruled on the issue of punitive damages. The Court of Appeals found that ruling to be "advisory." *Id*. Here, the jury found defendant liable and awarded actual and punitive damages; thus, a ruling on the punitive damage issue raised by Markeson was not moot or premature.

Even if the Trial Court's punitive damages ruling could be characterized as conditional, it was not error to make such a ruling. In fact this Court has encouraged trial courts to make such rulings. See, e.g., *Noll v. Shelter Ins. Companies, 774 S.W.2d 147, 149 (Mo. banc 1989)* where this Court, in an insurance coverage case, stated, "The court might have made a conditional ruling on the anti-stacking provision referred to in the defendant-insurer's memorandum, but was not obliged to do so. There could be efficiency in such conditional rulings…." And in *Kelly v. Hanson, 959 S.W.2d 107, 109 (Mo. banc 1997)* this Court found nothing wrong with the trial court's conditional ruling.

All the facts necessary for the Court's judgment had been determined by a jury and the court, and therefore, there was nothing premature or advisory about the judgment.

B. The Jury's Award Of Compensatory Damages Sufficiently Supported The Jury's Award Of Punitive Damages.

Even if the Trial Court's ruling on the punitive damage issue was erroneously premature, any such error was harmless, and does not require the Trial Court's judgment to be reversed.

Defendant claims that if the actual damage award is reduced to zero, then Plaintiff is not entitled to punitive damages. This argument has been considered and rejected by the Court of Appeals. See, e.g., *Freeman v. Myers, 774 S.W.2d 892, 894 (Mo.App. 1989)*.

In *Freeman*, the plaintiffs obtained an actual damage award of $7,559.27 and a punitive damage award of $100,000.00. The defendant argued that because the plaintiffs settled with the prior defendant in the amount of $32,500.00, "admittedly well in excess of her actual damages", the defendant could not be liable for actual or punitive damages.

Id. at 894. In rejecting the argument, the Court relied on *Exxon Corp. v. Yarmea, 516 A.2d 990 (Md.App. 1986)*. The Court summarized the *Exxon* case as follows:

> In *Exxon,* plaintiff had settled with a co-defendant of Exxon for an amount exceeding the actual damages awarded to plaintiff upon trial against Exxon. The trial court reduced the actual damage award against Exxon to zero by the application of the amount plaintiff had received from the co-defendant in settlement. Exxon argued that since plaintiff had already received his actual damages by way of settlement, and since a plaintiff had to show actual damages before he could be entitled to punitive damages, the plaintiff was therefore not entitled to the punitive damages awarded to him…. The Maryland Court… rejected Exxon's claim, holding that the jury's award of compensatory damages to plaintiff, even though it was canceled by the trial court's application of the settlement amount, satisfied the requirement of proof of compensatory damages before one could be entitled to punitive damages.

Id. at 894. Following the reasoning of the *Exxon* Court, the Court of Appeals rejected the defendant's argument and affirmed the punitive damage award. *Id*. at 895.

A similar result was reached in *Taylor v. Compere, 230 S.W.3d 606, 612 (Mo.App. 2007)* where the court allowed a plaintiff to bring a suit seeking punitive damages, where the actual damages alleged had already been satisfied by a separate defendant. The Court concluded that if the jury finds in favor of the plaintiff on his claim for actual damages, the jury could then award punitive damages against the defendant, even though the actual

damages awarded would be reduced to zero, because there will have been the requisite finding of actual damages to support the punitive damage award. *Id*. at 612-613.

Both *Freeman* and *Taylor* demonstrate that an award of actual damages, even if not owed, is sufficient to support an award of punitive damages. Here, it is undisputed that the jury entered a verdict against Defendant Markeson for actual damages. Thus, the punitive damage award was sufficiently supported, and the Trial Court did not err in entering judgment against Defendant Markeson for punitive damages. *Id*.

The cases cited by Defendant do not support her claim that the Trial Court's judgment was premature or that she would be entitled to JNOV if the actual damage award was reduced to zero. None of the cases cited by Defendant involved a case where the jury returned a verdict for both actual and punitive damages. Rather, each of those cases involved a situation where punitive damages were awarded without an award of actual damages. Finally, Defendant's argument that Plaintiff is not entitled to punitive damages is contrary to the holdings in *Freeman* and *Taylor*. Thus, Plaintiff respectfully requests that this Court deny Defendant's Point II.

CONCLUSION

The Court of Appeals asked the trial court to decide, "whether, on statutory *or* on public policy grounds, section 537.060 is inapplicable to this case given that the settling co-defendant faced dram shop liability under section 537.053.2 RSMo." The Trial Court properly denied Defendant Markeson a reduction under §537.060, and Plaintiff respectfully requests that this Court affirm the Trial Court. Defendant Markeson and the settling dram shop were not joint tortfeasors, and therefore, §537.060 does not apply.

Even if they were joint tortfeasors, the public policy behind §537.053 prohibits a reduction. The intent of the Act is to put the responsibility for the damages suffered by a plaintiff on the drunk driver who proximately caused those damages. Reducing Defendant Markeson's responsibility for paying the compensatory damages awarded to Plaintiff Payne would alleviate Defendant Markeson of the very responsibility §537.053 seeks to impose. Thus, the Trial Court properly denied Defendant's Motion for Reduction.

Finally, the compensatory damage award was sufficient to support the jury's award of punitive damages, and therefore, the Trial Court properly entered judgment against Defendant for the punitive damages awarded by the jury.

Plaintiff respectfully requests that this Court affirm the Trial Court's judgment.

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RULE 84.06(c) CERTIFICATION

I hereby certify that this Brief:

1. Complies with the limitations contained in Rule 84.06(b)

2. Contains 7,936 words.

3. Contains 934 lines.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this brief and attached Appendix with the Missouri Supreme Court by using the CM/ECF system on October 23, 2015. I certify that all participants in the case are registered users and that service will be accomplished by the CM/ECF system and e-mail to:

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